No. 03-1288

SUPREME COURT, U.S.
FILED
MAR 2 1 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

ROBERT HOLMES,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; VIRGINIA INTERNATIONAL TERMINALS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Avery T. Waterman, Jr.
Counsel of Record
Jennifer West Vincent
PATTEN, WORNOM, HATTEN & DIAMONSTEIN, L.C.
NationsBank Building
12350 Jefferson Avenue, Suite 300
Newport News, Virginia 23602
(757) 223-4555

Counsel for Petitioner

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, Virginia 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATUTES, RULE AND REGULATIONS 1

ARGUMENT 3

THE FOURTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH OTHER CIRCUITS ON THE SAME IMPORTANT MATTER 5

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT 8

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. 10

CONCLUSION 10

APPENDIX

TABLE OF AUTHORITIES

PAGE(S)

CASES

Albertson v. FCC,
182 F.2d 397 (D.C. Cir. 1950) 5

Bookman v. United States,
453 F.2d 1263 (Ct. Cl. 1972) 5

Bowman v. Loperena,
311 U.S. 262 (1940) 9

Holmes v. DOWCP,
66 Fed. Appx. 491,
2003 U.S. App. LEXIS 11646
(4th Cir. 2003) (unpublished) 5

ICC v. Brotherhood of Locomotive Eng'rs,
482 U.S. 270 (1986) 8, 9

Layne & Bowler Corp. v. Western Well Works, Inc.,
261 U. S. 387 (1923) 6

O'Keefe v. Aerojet-General Shipyards, Inc.,
404 U.S. 354 (1971)(*per curiam*) 5, 9

Ramey v. Stevedoring Servs. of Am.,
134 F.3d 954 (9th Cir. 1998) 6, 7

Rice v. Sioux City Mem. Park Cemetery Inc.,
349 U.S. 70 (1955) 10

Swierkiewicz v. Sorena N.A.,
534 U.S. 506 (2002) 6

Trujillo v. Gen. Elec. Co.,
621 F.2d 1084 (10th Cir. 1980) 4, 7

TVA v. Hill,
437 U.S. 153 (1978) 8

Wisconsin Elec. Co. v. Dumore Co.,
282 U.S. 813 (1931) 6

RULE

Fed. R. App. P. 32.1 (proposed) 1, 6

REGULATION

20 C.F.R. § 802.407.....1

OTHER AUTHORITY

E-Government Act of 2002,
Pub. L. 107-347, 205(a)(5), 116 Stat. 2899 .....2, 5

STATUTES, RULE AND REGULATIONS

20 C.F.R. § 802.407 provides, in pertinent part:

> (a) Any party-in-interest may, within 30 days from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to Section 802.403(b), request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any member of the original panel is unavailable, the Chairman shall designate a new panel member.
>
> (c) Except as provided in Sec. 801.301(d), even where no party has suggested reconsideration *en banc*, any permanent member may petition the permanent Board for reconsideration *en banc* of a panel decision.
>
> (d) Reconsideration *en banc* shall be granted upon the affirmative vote of the majority of permanent members of the Board. A panel decision shall stand unless vacated or modified by the concurring vote of at least three permanent members.

Fed. R. App. P. 32.1 Citation of Judicial Dispositions (proposed) provides:

> (a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, order, judgments, or other written dispositions that have been designated as "unpublished", "not for publication", "non-

> precedential", "not precedent", or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
>
> (b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

E-Government Act of 2002, Pub.L. 107-347, 205(a)(5), 116 Stat. 2899, 2913 provides, in pertinent part:

> (a) Individual Court Websites. - The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:
>
> > (5) Access to the substance of all written opinions written by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

ARGUMENT

Respondent VIT incorrectly represents that regardless of how the conflicts of legal authority identified by Petitioner are resolved, the outcome of this case would be the same. Respondent VIT mischaracterizes the position of Petitioner, focusing myopically on Petitioner's motion for reconsideration not having been filed within 30 days of BRB's initial decision by operation of law on March 7, 2001 (and ignoring BRB's 3/16/01 Decision and Order, its 4/4/01 Order of vacation, and the legal effects thereof). VIT Opp. Brief at 5.

Even Respondent DOWCP disagrees by implication, concisely summarizing Petitioner's position as follows:

> Petitioner contends that the BRB's March 16 decision 'necessarily constituted a *de facto* reconsideration and modification' of the March 7 automatic affirmance 'permitted by 20 C.F.R. § 802.407.' Pet. 4. Under that view, the March 16 decision tolled the time for filing a petition for review, and a new 60-day filing period began on April 4, the date on which the BRB vacated the March 16 decision. That filing period, in turn, was tolled on April 9, when petitioner filed his motion for reconsideration with the BRB. A new filing period then began on May 7, the date on which the BRB denied the motion for reconsideration. Because the petition for review was filed in the court of appeals within 60 days of May 7, petitioner contends that the court of appeals had jurisdiction.

DOWCP Opp. Brief at 6. Respondent DOWCP simply takes issue with BRB's 3/16/01 Decision and Order being a *de facto* or *sua sponte* reconsideration and questions whether BRB had any authority for reconsideration.

Petitioner refers the Court to the second paragraph of footnote 2 of his Petition at 8, which addresses the assertion of Respondents that BRB's 3/16/01 Decision and Order was not a *de facto* or *sua sponte* reconsideration. Restated very simplistically, the "intention" of BRB is utterly irrelevant; the indisputable fact is that BRB issued a new and different determination upon consideration of the merits after its automatic affirmance by operation of law.

The pivotal issue is whether BRB "possessed authority to issue a *sua spoute* reconsideration order." DOWCP Opp. Brief at 7. Respondents claim BRB's 3/16/01 unanimous Decision and Order on the merits is void and, correspondingly, did not trigger new filing deadlines. Conversely, Petitioner champions that BRB possessed such authority and, consequently, that the 3/16/01 Decision and Order was valid and reset the clock for him subsequently moving for reconsideration of its vacation thereof and petitioning for review of the denial thereof. Petitioner is correct on the core issue.

Dispositively, as all administrative agencies, BRB inherently has power to reconsider and to modify *sua spoute*. *E.g. Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) ("[W]e believe such power is implicit [even absent 'any statute or regulation expressly authorizing']. Administrative agencies have

an inherent authority to reconsider their own decisions, since the power to decide in the first instance carries with it the power to reconsider."); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972) ("[E]very tribunal, judicial or administrative, has power to correct its own errors or otherwise appropriately to modify its judgment."); *Albertson v. FCC*, 182 F.2d 397 (D.C. Cir. 1950); *Cf., O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 354, 356 (1971) (*per curiam*) (holding in a BRB case that an ALJ can reconsider and modify an order on "merely further reflection on the evidence initially submitted").

THE FOURTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH OTHER CIRCUITS ON THE SAME IMPORTANT MATTER

Respondent VIT contends that the opinion *sub judice* has "little, if any precedential value," because it is "unpublished."[1] Its contention is bereft of any supporting legal authority, is not joined by Respondent DOWCP, and is incorrect.

---

[1] The "unpublished" opinion *sub judice* actually is published in various places readily accessible to all courts, other litigants and the public at large. Through Lexis, it is published as *Holmes v. DOWCP*, 2003 U.S. App. LEXIS 11646 (June 12, 2003)(unpublished). Pursuant to the E-Government Act of 2002, Pub. L. 107-347, 205(a)(5), 116 Stat. 2899, 2913, the Fourth Circuit itself publishes the opinion on its website, www.ca4.uscourts.gov, at http://pacer.ca4.uscourts.gov/opinion.pdf/011761.U.pdf. Finally, the opinion is published in the new reporter for all "unpublished" federal circuit courts of appeals decisions since 2001, Federal Appendix, *Holmes v. DOWCP*, 66 Fed. Appx. 491 (4th Cir. 2003)(unpublished).

Even within the issuing Fourth Circuit Court of Appeals, its citation only is "disfavored" not prohibited. Moreover, ironically, in the majority of all other federal circuit courts, the Fourth Circuit's opinion is citable as authority. Proposed Rule 32.1 of the Federal Rules of Appellate Procedure, Citation of Judicial Dispositions, which was approved by the Judicial Conference Advisory Committee in 2003 upon the suggestion of the Solicitor General in 2001, is slated for use in 2005. 5/22/03 Report of Advisory Committee on Appellate Rules. 1a. The Advisory Committee Report debunks the fallacies and shortcomings surrounding unpublished opinions, which comprise about 80% of the opinions issued by the circuit courts in recent years. This Court properly grants writs of *certiorari* on unpublished opinions to resolve splits among the courts of appeals. *E.g., Swierkiewicz v. Sorena N.A.*, 534 U.S. 506 (2002).[2]

Although Respondents want to distinguish *Ramey v. Stevedoring Servs. of Am.*, 134 F.2d 954 (9th Cir. 1998) purely on factual grounds, the differences in fact simply do not reconcile the Fourth Circuit's opinion with *Ramey*. *Ramey's* basic holding that BRB retains jurisdiction to reconsider even after its "final" decision by operation of law squarely conflicts with the Fourth Circuit's basic holding that a "final" decision by operation of law rendered BRB without jurisdiction and any reconsideration by it "void"! Unlike in *Wisconsin Elec. Co. v. Dumore Co.*, 282 U.S. 813 (1931),

---

[2] *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923), cited by Respondent VIT, is inapposite. The two circuit court opinions therein "were really in harmony and not in conflict" on patent validity. 261 U.S. 392.

the difference between *Ramey* and the Fourth Circuit's opinion is "in application of a principle of law" and not simply "in states of fact."

Significantly, however in addition to conflicting with *Ramey*, the Fourth Circuit's opinion also conflicts with the opinions of the Tenth Circuit and other circuits, *supra*, on the inherent power of all administrative agencies to reconsider and change their orders. The analogous facts of *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084 (10th Cir. 1980) are instructive. In *Trujillo*, the Equal Employment Opportunity Commission ("EEOC") issued a determination and Notice of Right-to-Sue on December 2, 1976; but on January 24, 1997, reconsidered and issued a revised determination. 621 F.2d at 1085. The employer argued that EEOC lacked authority to reconsider and change its determination and that the 90-day time limit for its employee filing suit ran from the date of issuance of the initial determination. The Tenth Circuit rejected that analysis, observing that "[a]dministrative agencies have an inherent authority to reconsider their own decisions," and holding that the reconsideration reset the limitation time clock to run from the later date of issuance of the revised determination. 621 F.2d at 1086. Obviously, this conflicts with the Fourth Circuit's opinion that BRB's 3/16/01 Order and Decision and its subsequent vacation thereof did not trigger new deadlines for Petitioner moving for reconsideration thereof and subsequently petitioning for review of the denial thereof.

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

By its conspicuous silence on the point, Respondent VIT concedes that the Fourth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Contrarily, Respondent DOWCP does not. But it does concede that the Court's decisions at issue do stand for the legal propositions for which Petitioner cited them, and simply claims (incorrectly) nonetheless that they do not apply to the matter *sub judice*.

Respondent DOWCP concedes that *TVA v. Hill*, 437 U.S. 153 (1970) reaffirmed "the longstanding canon of statutory construction disfavoring implied repeals of statutes by appropriations acts." It then claims that the Fourth Circuit did not impliedly repeal the BRB's regulatory authority (to reconsider and enter a new order) by invoking Public Law No. 106-554 as supreme and preemptive. DOWCP Opp. Brief at 8-9. But indisputably, the Fourth Circuit summarily concluding the aforesaid appropriations law rendered BRB's 3/16/01 Decision and Order on the merits void and ineffective is tantamount to an implied repeal of BRB's regulatory right (and inherent power) to reconsider *sua sponte*. *TVA* applies; the Fourth Circuit conflicts.

Respondent DOWCP also concedes that *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1986) "stands for the proposition that, when an administrative tribunal reopens a case and issues a new

decision upon reconsideration of a previously entered order, the new decision is subject to review on its merits." It then claims that "BRB's March 16 decision did not 'reopen' the case in the sense contemplated by the court in *Locomotive Engineers*". DOWCP Opp. Brief at 9. But indisputably the BRB reopened this case in fact by issuing its 3/16/01 Decision and Order *sua spoute* and this Court did not limit how a case could be reopened. *Locomotive Eng'rs* applies; again the Fourth Circuit conflicts.

Respondent DOWCP additionally concedes that *Bowman v. Loperena*, 311 U.S. 262 (1940) held "where the court allows the filing [late] and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial and the time for appeal runs from the date thereof." It then claims no applicability to the matter *sub judice*, by focusing myopically ōn the motion for reconsideration. DOWCP Opp. Brief at 10. But indisputably the key "late" case activity that resets all of the subsequent time deadlines is BRB's 3/16/01 Decision and Order. *Bowman* applies; again, the Fourth Circuit conflicts.

Finally, the Fourth Circuit's opinion conflicts with *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 354 (1971)(*per curiam*). In *O'Keefe*, a BRB case, this Court held that an ALJ can reconsider and modify an order on "merely further reflection on the evidence initially submitted." 404 U.S. at 356. Contrarily, the Fourth Circuit found administrative reconsideration and modification *sua sponte* "void."

THE FOURTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The matter *sub judice* is not merely a "fact-bound decision," DOWCP Opp. Brief at 5; or "of importance [only] to . . . the parties". VIT Opp. Brief at 2. Respondent, DOWCP cites no authority; and *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) on which Respondent VIT relies solely is inapposite. *Rice* found the grant of a writ improvident where a remedial statute precluded the unique, highly personalized issue from ever arising again and, thereby, rendered the case one of "isolated significance" (to only the parties).

Unlike *Rice*, if allowed to stand, this case history easily can (and probably will) repeat itself. Moreover, this case has general applicability not only to other cases of BRB acting after the one year window of Pub. Law 106-554 (and its successor enactments), but also to cases of other administrative tribunals acting beyond their respective appropriations law windows. It is important that the regulatory rights/responsibilities (and inherent power) of administrative tribunals to modify their decisions *sua spoute* be vindicated.

CONCLUSION

For the foregoing reasons, Petitioner prays, the Court issue a writ of *certiorari*.

Respectfully submitted,
ROBERT HOLMES

Avery T. Waterman, Jr., Esq.
Jennifer West Vincent, Esq.
Patten, Wornom, Hatten & Diamonstein, L.C.
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602
(757) 223-4555 TEL
(757) 249-3242 FAX
Counsel for Petitioner

TABLE OF CONTENTS
Appendix to Reply to Brief in Opposition

Page

Memorandum to
The Honorable Anthony J. Scirica from
The Honorable Samuel A. Alito, Jr.
Re: Report of Advisory Committee on
Appellate Rules
filed May 22, 2003 ..... 1a

MEMORANDUM

DATE: May 22, 2003

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

[FILED: MAY 22, 2003]

I. Introduction

The Advisory Committee on Appellate Rules met on May 15, 2003, in Washington, D.C. At its meeting, the Advisory Committee approved three proposed amendments, removed two proposals from its study agenda, and agreed to continue to study several other proposals. Detailed information about the Advisory Committee's activities can be found in the minutes of the May 15 meeting and in the Advisory Committee's study agenda, both of which are attached to this report.

II. Action Items

Pursuant to the request of the Standing Committee, the Advisory Committee has not forwarded proposed amendments to the Standing

Committee in a piecemeal fashion, but instead has collected proposed amendments to present to the Standing Committee at one time. The last group of proposed amendments to the Appellate Rules were published in August 2000 and took effect in December 2002. The Advisory Committee now seeks the Standing Committee's approval to publish another group of proposed amendments in August 2003.

(Items not related to New Rule 32.1 omitted)

E. New Rule 32.1

The Advisory Committee proposes to add a new Rule 32.1 that would require courts to permit the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," non-precedential," or the like. New Rule 32.1 would also require parties who cite "unpublished" or "non-precedential" opinions that are not available in a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties. The Advisory Committee makes this proposal for two reasons:

First, the local rules of the circuits differ dramatically in their treatment of the citation of "unpublished" or "non-precedential" opinions for their persuasive value. Some circuits freely permit such citation, some circuits disfavor such citation but permit it in limited circumstances, and some circuits do not

permit such citation under any circumstances. These conflicting rules create a hardship for practitioners, especially those who practice in more than one circuit.

Second, the Advisory Committee believes that restrictions on the citation of "unpublished" or "non-precedential" opinions the violation of which can lead to sanctions or to formal charges of unethical conduct C are wrong as a policy matter. The Advisory Committee defends its position at length in the Committee Note, so I will say no more about it here.

Needless to say, this is a controversial matter. Many attorneys and bar organizations are strongly opposed to no-citation rules; indeed, Dean Schiltz tells me that no issue has generated more correspondence to the Advisory Committee over the past six years. Although many judges have also expressed their opposition to no-citation rules in fact, several circuits do not have such rules other judges are passionate in defending such rules. If the Standing Committee approves proposed Rule 32.1 for publication, we will undoubtedly receive a substantial number of comments.

I want to stress here as I have stressed in prior communications to the Standing Committee that proposed Rule 32.1 is extremely limited. It takes no position on whether designating opinions as "unpublished" or "non-precedential" is constitutional. It does not require any court to issue and"unpublished" or "non-precedential" opinion, nor does it forbid any court from doing so. It does not dictate the circumstances under which a court may

choose to designate an opinion as "unpublished" or Anon-precedential." Most importantly, it says nothing whatsoever about the effect that a court must give to one of its own "unpublished" or "non-precedential" opinions or to the "unpublished" or "non-precedential" opinions of another court. The one and only issue addressed by proposed Rule 32.1 is the ability of parties to *cite* opinions designated as "unpublished" or Anon-precedential."

The Advisory Committee approved proposed Rule 32.1 at our May 2003 meeting by vote of 7 to 1, with one abstention.

Rule 32.1. Citation of Judicial Dispositions

(a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, order, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," Anon-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of "unpublished" opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of "unpublished" opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as "unpublished." Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of "unpublished" opinions, most agree that an "unpublished" opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that

"unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. *See Symbol Tech., Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-1368 (Fed. Cir. 2002); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Williams v. Dallas Area Rapid Transit*, 256 F.3d 260 (5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed "unpublished" opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double

jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an "unpublished" opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may

not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of all judicial opinions "published" and "unpublished."

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearean sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and soon every court of appeals will be required by law to post all of its decisions including "unpublished" decisions on its website. *See* E-Government Act of 2002, Pub. L. 107-347, '205(a)(5), 116 Stat. 2899, 2913. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit). If this widespread scrutiny does not deprive courts of

the benefits of "unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as "published" opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no "published" opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to

admitting that no "published" opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First

Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must file and serve a copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* of the judicial opinions that they cite). "unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).